Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D4-22-649-1994
ABU SAMAH JC
8 MAY 1995

Arbitration *— Stay of proceedings — Conditions to be satisfied before proceedings can be stayed — Whether onus shifted to plaintiff to give sufficient reason why matter should not be referred to arbitration — Whether terms of agreement wide enough to cover disputes of fact and law — Whether fact that subject matter involved question of law or of a nature suitable for trial is a sufficient ground to refuse stay*

The plaintiff and the defendant entered into a building contract ('the main agreement') whereby the plaintiff was appointed by the defendant as the main contractor for a construction project. The contract provides in cl 30 that the plaintiff was entitled to progressive payments from the defendant under interim certificates issued by the project architect. It further provides in cl 34 that any disputes whatsoever between the parties, arising from or in connection with the contract, during the validity or after discharge of contract, shall be referred to arbitration. The defendant later entered into a separate agreement ('the second agreement') with a third party, one of the sub-contractors nominated the plaintiff, with the plaintiff's knowledge. Pursuant to this agreement, the defendant is entitled to, in event of delay, impose penalty sums and deduct the same from the above-mentioned progressive payments. Interim certificates were issued by the project architect under which some payments were made and some were not. The defendant contended that it was entitled to withhold payment under the second agreement with the sub-contractor. The plaintiff commenced an action against the defendant for payment of the outstanding balance whereupon the defendant applied for stay of all proceedings pursuant to s 6 of the Arbitration Act 1952 and/or under the inherent jurisdiction of the court as the dispute should be referred to arbitration. The application was allowed by the deputy registrar by a summons-in-chambers. Therefore, the plaintiff appealed against the decision of the deputy registrar. The plaintiff argued that questions of law were involved which were: (i) that the defendant could not vary the main agreement by entering into a second agreement with the sub-contractor; (ii) that the plaintiff was not privy to the second agreement and cannot be bound by it; (iii) that the second agreement could not constitute valid assignment, in law or in equity, of the sub-contractor's debt to the defendant; and (iv) that the second agreement was outside the ambit of the arbitration clause in the first agreement. With all these involving questions of law, the plaintiff argued that the dispute should be determined by the court and not by arbitration.

Held, dismissing the appeal:

(1) Before a stay of further proceedings can be granted, three conditions must be satisfied. First, there must be a dispute which

falls within the terms of the arbitration agreement in question. Second, the defendant must apply to the court for a stay of proceedings before taking any other steps in the proceedings. Third, the defendant must prove that he was ready and willing to do all things necessary to the proper conduct of the arbitration. Here, the defendant has satisfied all three conditions. Therefore, the onus shifted to the plaintiff to convince the court that there was sufficient reason why the matter should not be referred to arbitration (see pp 161D–H, 162C–D, H; *Heyman & Anor v Darwins Ltd* [1942] AC 356; *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1976] 2 BLR 57; 120 SLJ 167 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed, *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20; *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 and *Turnock v Sartoris* (1889) 43 Ch D 150 distinguished).

(2) The disputes here were on the progress payments which were covered in the main agreement. The terms of the main agreement are sufficiently wide to cover any dispute or difference involving both questions of fact and of law. The dispute here was not confined to question of law alone but includes questions of fact and matters relating to construction works which are normally dealt with by arbitrators. The mere fact that the subject matter involved a question of law or was of a nature eminently suitable for trial in a court of law was not sufficient ground for refusing to stay the action. There is, therefore, no sufficient reason to refuse the stay (see p 164D–H; *Phoenix Timber Co Ltd's Application, Re* [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574 followed).

[Bahasa Malaysia summary

Plaintif dan defendan memasuki kontrak pembinaan ('perjanjian utama') di mana plaintif telah dilantik oleh defendan sebagai kontraktor utama untuk projek pembinaan. Kontrak mensyaratkan di bawah fasal 30 bahawa plaintif berhak menerima bayaran berperingkat dari defendan apabila perakuan interim diisu oleh akitek projek. Ia disyaratkan juga di bawah fasal 34 bahawa apa-apa pertikaian di antara pihak-pihak, yang timbul dari atau berkaitan dengan kontrak, semasa kesahan atau selepas pelepasan kontrak, akan dirujuk kepada timbangtara. Defendan kemudiannya memasuki perjanjian yang berasingan ('perjanjian kedua') dengan pihak ketiga, salah seorang subkontraktor yang dilantik oleh plaintif, dengan pengetahuan plaintif. Mengikut perjanjian itu, defendan berhak, jikalau terjadinya kelewatan, menggenakan sejumlah penalti dan menolak jumlah penalti itu dari bayaran berperingkat. Perakuan interim diisu oleh akitek projek di mana beberapa bayaran dibuat dan beberapa tidak. Defendan mempertikaikan bahawa ia berhak untuk menahan bayaran di bawah perjanjian kedua dengan subkontraktor. Plaintif memulakan tindakan terhadap defendan untuk bayaran baki yang belum dijelaskan dan

dengan itu defendan memohon penggantungan prosiding mengikut s 6 Akta Timbangtara 1952 dan/atau di bawah bidang kuasa sedia ada mahkamah kerana pertikaian itu patut dirujuk kepada timbangtara. Permohonan itu dibenarkan oleh timbalan pendaftar melalui saman dalam kamar. Maka, plaintif merayu terhadap keputusan timbalan pendaftar itu. Plaintif mengemukakan alasan bahawa terdapat persoalan undang-undang yang timbul iaitu: (i) bahawa defendan tidak boleh mengubah perjanjian utama dengan memasuki perjanjian kedua dengan subkontraktor; (ii) bahawa plaintif tidak ada privity dengan perjanjian kedua itu dan tidak terikat dengannya; (iii) bahawa perjanjian kedua bukan suatu penyerahhakan yang sah, dalam undang-undang mahupun ekuiti, untuk hutang subkontraktor kepada defendan; dan (iv) bahawa perjanjian kedua adalah di luar lingkungan fasal timbangtara dalam perjanjian utama. Dengan semua persoalan undang-undang ini, plaintif mengatakan bahawa pertikaian ini patut diselesaikan di mahkamah dan bukan melalui timbangtara.

Diputuskan, menolak rayuan itu:

(1) Sebelum penggantungan prosiding dibenarkan, tiga syarat mesti dipenuhi. Pertama, mesti ada pertikaian seperti dalam erti terma perjanjian timbangtara yang dipersoalkan itu. Kedua, defendan mesti memohon kepada mahkamah untuk penggantungan prosiding sebelum mengambil apa-apa langkah lain dalam prosiding. Ketiga, defendan mesti membuktikan bahawa dia sedia dan rela membuat semua yang perlu untuk pengendalian timbangtara yang betul. Di sini, defendan telah menyempurnakan ketiga-tiga syarat itu. Maka, beban telah berpindah kepada plaintif untuk meyakinkan mahkamah bahawa adanya sebab yang mencukupi mengapa perkara itu tidak patut dirujuk kepada timbangtara (lihat ms 161D–H, 162C–D, H; *Heyman & Anor v Darwins Ltd* [1942] AC 356; *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1976] 2 BLR 57; 120 SLJ 167 dan *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 diikut, *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20; *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 dan *Turnock v Sartoris* (1889) 43 Ch D 150 dibeza).

(2) Pertikaian di sini adalah terhadap bayaran berperingkat yang dirangkumi oleh perjanjian utama. Terma perjanjian utama adalah cukup luas untuk merangkumi mana-mana pertikaian atau perbezaan termasuk kedua-dua persoalan fakta dan undang-undang. Pertikaian di sini tidak hanya terbatas kepada persoalan undang-undang sahaja tetapi termasuk persoalan fakta dan perkara yang berkaitan dengan kerja pembinaan yang selalunya diselesaikan oleh penimbangtara. Semata-mata kerana tajuk perkara melibatkan persoalan undang-undang atau mempunyai sifat yang mana perbicaraan sangatlah sesuai bukanlah sebab yang mencukupi untuk menolak penggantungan tindakan. Maka, tidak terdapat sebab yang mencukupi untuk menolak penggantungan itu (lihat ms 164D–H; *Phoenix Timber Co Ltd's*

A *Application, Re* [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574 diikut).]

Notes

For cases on stay of proceedings in arbitration, see 1 *Mallal's Digest* B (4th Ed, 1995 Reissue), paras 797 and 806–833.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208
Bristol Corp v Aird (John) Ltd [1913] AC 241
Ellis Mechanical Services Ltd v Wates Construction Ltd [1976] 2 BLR C 57; 120 SLJ 167
Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20
Heyman & Anor v Darwins Ltd [1942] AC 356
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459
D *Metropolitan Tunnel and Public Works, Ltd v London Electric Rly Co* [1926] 1 Ch 371
Phoenix Timber Co Ltd's Application, Re [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97
E *Turnock v Sartoris* (1889) 43 Ch D 150
Wilesford v Watton (1872–73) LR 8 Ch App 473

Legislation referred to

Arbitration Act 1952 s 6
F Arbitration Act 1889 s 4 [UK]

WT Yap (CC Choo & Co) for the plaintiff.
Poh Leong Oon (Cheong Kee Fong & Co) for the defendant.

G *Cur Adv Vult*

Abu Samah JC: This is an appeal by the plaintiff against the decision of the deputy registrar given on 4 August 1994 allowing the defendant's application by way of summons-in-chambers ('encl 6') dated 13 July 1994 to stay:

H (i) all further proceedings in this action pursuant to s 6 of the Arbitration Act 1952 ('the Act') and/or under the inherent jurisdiction of the honourable court, the plaintiff and defendant having by an agreement in writing dated 8 August 1991 agreed to refer to arbitration the matters in respect of which this action is brought;

I (ii) that service of a defence, if found to be required, may be deferred until such time as this honourable court shall determine; and

(iii) that the plaintiff do pay to the defendant its costs of and occasioned by this action including the costs of this application to be taxed.

Facts in brief

The plaintiff commenced this action against the defendant by way of a writ of summons dated 25 June 1994. Paragraph 3 of the statement of claim states that by an agreement dated 8 August 1991 ('the main agreement') between the plaintiff and the defendant, the latter appointed the former as the main contractor for a construction project known as 'Stage II Works — Superstructural works for the proposed 33-storey Goldhill Plaza ('Goldhill Plaza project'). Clause 30(1) of the main agreement provides, inter alia, that the plaintiff shall be entitled to interim payments from the defendant under the interim certificates issued by the project architect within 30 days from the dates of presentation of such certificates.

The project architect had issued the following interim certificates:

Interim certificate No	Dated	Amount certified		Balance outstanding	
17	8 March 1993	RM	1,642,000	RM	250,000
18	9 April 1993	RM	2,136,000	RM	20,000
19	13 May 1993	RM	1,243,600	RM	20,000
20	24 June 1993	RM	2,448,600	RM	2,218
21	21 July 1993	RM	1,231,314	RM	916,761
22	7 December 1993	RM	761,000	RM	761,000
Total outstanding				RM	1,969,979

The defendant had paid a sum of RM909,075 (under the interim certificate No 21) as part payment towards the sum of RM1,969,979 leaving a balance of RM1,060,904 which the defendant refused, failed and/or neglected to settle, despite repeated requests and reminders from the plaintiff. The plaintiff therefore claims against the defendant, inter alia, the following:

(a) a balance sum of RM1,060,904; and

(b) a sum of RM364,114.90 (as at 31 May 1994) as special damages.

On 14 July 1994, the defendant paid another RM768,686 which was due under interim certificates Nos 21 and 22, leaving a balance of RM292,218 which is still due and owing to the plaintiff (see plaintiff's affidavit affirmed by Chong Wan Ping, on 28 July 1994).

The defendant's application

The defendant's application for a stay of all further proceedings in this action is supported by an affidavit of Raymond Lum Kar Lee ('the defendant's affidavit'), the project manager of the defendant, affirmed on 12 July 1994. A copy of the main agreement is annexed to the said affidavit as exh RL-1. Clause 34(1) of the said agreement states:

> In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after completion or abandonment of the works, as to any matter or thing of

> whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in cl 30(5)(a) of these conditions or the rights and liabilities of the parties under cll 25, 26, 31 or 32 of these conditions), then such disputes or differences shall be referred to arbitration.

The defendant claimed that disputes had arisen under the main agreement. These disputes were in respect of the progress payments under the interim certificates which were due to Lightweight Concrete Sdn Bhd ('the sub-contractor') but were withheld by the defendant. Lightweight Concrete Sdn Bhd was one of the nominated sub-contractors of the plaintiff. The defendant contended that it was entitled to withhold and/to deduct from the interim payments due to the sub-contractor under an agreement entered into between them. This is evidenced by a letter dated 10 July 1992 from the defendant to the sub-contractor ('exh RL-2' of the defendant's affidavit).

Under this agreement ('the second agreement') the sub-contractor agreed with the defendant that if it failed to complete the installation of precast panels on or before 31 August 1992, the latter would be entitled to impose a penalty of RM10,000 per day and be allowed to deduct the said sum from the progress payments due to it. It was further agreed that the defendant would be allowed to impose a penalty of RM10,000 per day if the sub-contractor failed to complete the works from and above level 31 up to the top of the building on or before 30 September 1992, and be allowed to deduct the said sum from the progress payments or any money that may be due to the sub-contractor.

The plaintiff knew of this second agreement. It appeared that it was the plaintiff who suggested that the second agreement be administered separately. These facts were contained in a letter (exhibited in the plaintiff's affidavit) dated 14 September 1992 from SC Yoong & Rakan-Rakan Akitek-Akitek ('the project architect') to the defendant and copied to the plaintiff. The relevant extract reads:

> With reference to your letter to Lightweight Concrete Sdn Bhd dated 10 July 1992 copied to us, we concur with the views expressed in Teknik Cekap Sdn Bhd's and Baharuddin Ali & Low Sdn's letters to us dated 18 August 1992 ... and 7 September 1992 ... respectively, that in order not to overly complicate the issues, these revised conditions should be treated as a separate agreement between your goodself and Lightweight Concrete Sdn Bhd and to be separately administered between you and Lightweight Concrete Sdn Bhd.

The sub-contractor's works were indeed behind schedule. This was known to, and not disputed by, the plaintiff. The defendant, presumably acting on the advice of the project architect, withheld the progress payments due to the sub-contractor under the relevant interim certificates. The advice was contained in a letter dated 9 March 1993 from the project architect to the defendant in the following terms:

> ... in consideration of the penalty which is applicable in accordance with your additional agreement and the possible quantum involved, it should be within your rights to withhold the interim payment to Lightweight Concrete Sdn Bhd for the time being. Please officially inform Teknik Cekap Sdn Bhd on this matter when you do so.

The defendant, in its affidavit, also exhibited several letters between the project architect and the plaintiff. In one of the letters which was dated 30 July 1993, the project architect wrote to the plaintiff informing it that the defendant was:

> ... withholding these progress payments due to penalties that they can levy on Lightweight Concrete Sdn Bhd in accordance to a separate agreement made between them dated 10 July 1992 which had been copied to you. From the records it can be easily established that considerable delays have occurred. However, as the full penalties have not been fully established, Nirwana Indah Sdn Bhd have as yet not deducted such sums from any payment due to Lightweight Concrete Sdn Bhd. They are at present only withholding such payments ...

The defendant further states in its affidavit that the matters in dispute are within the scope of main agreement to refer disputes and differences to arbitration; that they are fit and proper matters for reference to arbitration; that there is no reason why the matters should not be so referred. The defendant has not taken any other steps in this action and that it was at the time when the action was commenced and remains ready and willing to do all things necessary to enable all the matters in dispute to be determined by arbitration in accordance with cl 34 of the main agreement.

The plaintiff's objection

The reasons for the plaintiff's objection to stay all further proceedings in this action are as stated in the affidavit in reply of Chong Wan Ping, a director of the plaintiff, affirmed on 28 July 1994. In essence, the plaintiff claims that it is entitled under cl 30(1) of the main agreement to progress payments due from the defendant under the relevant interim certificates issued from time to time by the project architect, within 30 days from the date of representation of such certificates. The defendant has no right to withhold or deduct any payment due to the plaintiff under the main agreement, unless it is so provided. This is so even if the balance sum represents amounts which are ultimately to be paid by the plaintiff to the sub-contractor.

The plaintiff contends that the defendant cannot vary the main agreement by entering into a second agreement with the sub-contractor. The plaintiff is not privy to the second agreement and it cannot be bound by the said agreement. The plaintiff also contends that the second agreement cannot constitute a valid assignment, in law or in equity, of the sub-contractor's debt to the defendant.

Learned counsel for the plaintiff submitted that the disputes relate to the construction of the main agreement and the validity of the alleged assignment of the sub-contractor's debt to the defendant under the second

agreement. These are questions of law which should be determined by the court and not by arbitration. The second agreement itself is outside the scope of cl 34 of the main agreement.

The law

Section 6 of the Arbitration Act 1952 states:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Before a stay of further proceedings can be granted under s 6 of the Act, three conditions must be satisfied. Firstly, there must be a 'dispute' which falls within the terms of the arbitration agreement in question. This will rule out cases where what is in dispute is the very existence of either the contract itself or the arbitration clause for it is not for an arbitrator to determine the existence or extent of his or her own jurisdiction (see *Heyman v Darwins Ltd* [1942] AC 356); it will also rule out cases in which the plaintiff's claim is indisputable, notwithstanding the provision of an arbitration clause (see *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1976] 2 BLR 57; 120 SLJ 167).

Secondly, the defendant must apply to the court for a stay of proceedings before taking any other steps in the proceedings (see *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97).

Thirdly, it is dependent upon proof that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration (see *Seloga Jaya Sdn Bhd*).

If all the above conditions are satisfied, the onus switches to the plaintiff to convince the court that there is sufficient reason why the matter should not be referred to arbitration.

In *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, Peh Swee Chin J (as he then was) said at p 460:

> In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. Please see the old case of *Drouth v The Ship, Paul Donmer* [1934] MLJ 72, and if the plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the prima facie duty of the court to act upon such an arbitration agreement, per Lord Selbourne LC in *Willesford v Watson.*

In *Seloga Jaya Sdn Bhd* at p 111, Edgar Joseph Jr SCJ said:

> But, generally, ... the approach of the court will be those who make a contract to arbitrate their disputes, should be held to their bargains for, in the oft-quoted words of Martin B in *Wickham v Harding* (1859) 28 LJ Ex 215:
>
> 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.

A

B

At the same page, the learned SCJ added:

> Now it is clear by the law as it was laid down in *Heyman v Darwins Ltd* [1942] AC 356, that the onus is on a plaintiff to satisfy the court that it is proper to refuse the application for a stay. Indeed, the case of *The Eleftheria* [1969] 1 Lloyd's Rep 237 shows that strong grounds for refusing a stay must be exhibited by the plaintiff.

C

In my view, the defendant had satisfied all the three conditions above. The plaintiff, nevertheless, contended on the authority of *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20, that the validity of the alleged assignment of debt under the second agreement by the sub-contractor to the defendant relates to question of law which should be determined by the court and not by arbitration. *Hashim*'s case is distinguishable. In that case, the issue was not confined to the validity of the notice of termination alone, which was, a question of law. Fraud was also raised as a ground for opposing stay of proceedings and the court held that issue of fraud was not a matter for the determination of an arbitrator.

D

E

Plaintiff's counsel also relied on *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 and *Turnock v Sartoris* (1889) 43 Ch D 150 as authorities that questions arising as to the construction of an agreement ought not to be referred to arbitration.

The facts in both cases are different. There, unlike the case before me, the defendants sought to stay actions under the subsequent agreements by relying on the arbitration clauses under the earlier leases. The courts, in both cases, refused the stay on the grounds, amongst others, that there were matters under the subsequent agreements which were not within the scope of the arbitration clauses and therefore the arbitrators were not competent to deal with them. Raja Azlan Shah J in *Alagappa Chettiar*'s case said at p 210:

F

G

> A close examination of the arbitration clause reveals that the scope of the reference to arbitration extends only to matters 'under or in connection with this lease', and that to my mind, simply refers to matters arising under the lease alone and does not include matters arising under the subsequent agreement.

H

In the case before me, the defendant sought to stay the action under the main agreement and not under the subsequent agreement, ie the second agreement. The disputes are on the progress payments in respect of works which are covered by the main agreement.

I

The weight of authorities seems to suggest a change in the judicial attitude on this point. For example, in England, the modern tendency is undoubtedly against refusing a stay, and the onus will be on the party opposing to stay to show for example, that the point is of such substance

A that it must inevitably come to the court whatever the arbitrator decides (see *Hudson's Building and Engineering Contracts* (10th Ed) by IN Duncan Wallace).

The statement by Lord Parker in *Bristol Corp v Aird (John) Ltd* [1913] AC 241 that, 'Everybody knows that with regard to the construction B of an agreement it is absolutely useless to stay the action because it will only come back to the court on a case stated,' must now be considered in the light of the comment of the Law Lords, in particular Lord Wright, in *Heyman & Anor v Darwins Ltd* [1942] AC 356. Lord Wright qualified that statement by saying at p 389:

C > ... but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often, that under a general submission the arbitrator is appointed to decide issues both of fact and of law. In the background, indeed, it is the court's jurisdiction to set aside an award if it is bad in law on its face ... but, if the submission is general, it will require some substantial reason to induce the court to deny D its due effect to the agreement of the parties to submit the whole dispute, whether it includes both of fact and law or is limited to either fact or law.

In *Heyman*'s case, the House of Lords had to decide whether an action by the appellants against the respondents should on the application of the latter, be stayed pursuant to s 4 of the Arbitration Act 1889. Cassels J held E that the issue involved only a question of law and in the exercise of his discretion, refused to grant a stay. The Court of Appeal allowed the appeal by the respondents, holding that the arbitration clause applied and that Cassels J had wrongly exercised his discretion. On appeal by the appellants to the House of Lords, Lord Viscount Simon LC in dismissing the appeal and affirming the decision of the Court of Appeal stated at p 368 that:

F > ... the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed.

At p 369, he added:

> Even if the learned judge were right in regarding the issue as one in which G nothing but a question of law is involved, that circumstance would not necessarily and in all cases make it right to refuse a stay ... Moreover, in the present case questions of fact may well have to be determined and the dispute as a whole is of a class which is constantly dealt with by an arbitrator. There is no sufficient reason why the matter should not be referred, and therefore, by the express language of s 4, there must be a stay.

H In *Metropolitan Tunnel and Public Works, Ltd v London Electric Rly Co* [1926] 1 Ch 371, the plaintiff took out a summons for the determination of the question whether upon the true construction of the contract, for the purpose of the payments to be made to the plaintiffs thereunder, the value of the works executed by the plaintiffs was to be ascertained by adding to I the prices contained in the schedules a proportionate amount of the sum therein provided for 'general contingencies' or if not, how the value of the work executed by the plaintiff was to be ascertained for the purpose aforesaid. The defendants applied for a stay of proceeding under s 4 of the Arbitration Act 1889 on the ground that the question should be referred to arbitration as provided in the contract.

Lawrence J dismissed the application on the grounds that the question raised was purely a question of law arising out of the construction of the contract and it was more convenient that the court should ascertain for itself in the pending proceedings any fact necessary for the purpose of determining the question of construction than that the question should be referred to an arbitrator to state the facts and the matter come back to the court on the question of construction.

On appeal, the Court of Appeal reversed Lawrence J's decision and held, inter alia, that there was a clear and definite contract between the parties that the matter in dispute should be referred to an engineer arbitrator as being a person who possessed technical knowledge for dealing with the subject matter of the contract and that the case was not one which involved a simple question of law.

Lord Selborne in *Wilseford v Watton* (1872–73) LR 8 Ch App 473 at p 480 said:

> If parties chose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts ... a prima facie duty is cast upon the courts to act upon such an agreement.

Coming back to the instant case before me, it appears to me that the terms of cl 34 of the main agreement are sufficiently wide to cover any dispute or difference involving both questions of fact and of law. Clause 34 refers to 'any dispute or difference' between the parties 'during the progress ... of the works as to any matter or things of whatsoever nature arising thereunder or in connection therewith'. Hence, I am unable to agree with the submission of the learned counsel for the plaintiff that questions of law or construction of an agreement ought necessarily to be determined by the court and not by arbitration. The governing consideration must be the terms of the arbitration clause itself.

I agree with the submission of the learned counsel for the defendant that the dispute is not confined to question of law alone but includes questions of fact and matters relating to construction works which are normally dealt with by arbitrators. The defendant was and is ready and willing to do all things necessary to enable all matters in dispute to be determined by arbitration, a fact which is never contradicted by the plaintiff in its affidavit. The mere fact that the subject matter of a submission involves question of law or is of a nature eminently suitable for trial in a court of law is not sufficient ground for refusing to stay the action (see *Re Phoenix Timber Co Ltd's Application* [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574). In my judgment, there is no sufficient reason for me to exercise my discretion to refuse the stay.

For the above reasons, the appeal is dismissed with costs.

Appeal dismissed.

Reported by Victor Gidwani